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In the Supreme Court of the United States

OCTOBER TERM, 1953

THOMAS B. RUSSELL, HARVEY R. WHEELER, HOMER C. SEWELL, CHARLES DUVIS AND JAMES JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 425

THOMAS B. RUSTAD, HARVEY R. WYBORNEY, HOMER C. SKELLY, CHARLES DIVEN AND JAMES JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. App. i-xiv) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958. A petition for rehearing was denied on September 9, 1958. The petition for a writ of certiorari was filed on October 7, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 121.4 of the Alaska Commercial Fisheries Regulations proscribed off-season fishing in Zimovia Strait.

2. Whether Sections 121.3 and 121.4 of the Alaska Commercial Fisheries Regulations are unenforceable because of indefiniteness.

3. Whether the trial court erred when, in instructing the jury that the government was not required to prove that petitioners intended to fish illegally but only that they were actually fishing commercially at the time and in the place specified in the information, it failed to repeat an earlier instruction that the burden upon the prosecution was to prove the offense charged beyond a reasonable doubt.

STATUTES AND REGULATIONS INVOLVED

The Act of June 6, 1924, 43 Stat. 464, as amended, 48 U. S. C. 221, *et seq.*, provides in part:

48 U. S. C. 221:

> For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any

area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable.

48 U. S. C. 222:

> From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: * * *.

48 U. S. C. 226:

> Any person, company, corporation or association violating any provisions of sections 221–228 or 230–241 of this title, or of any regulation made under authority of said sections shall, upon conviction thereof be punished by a fine not exceeding $5,000 or imprisonment for a term of not more than ninety days in the county jail or by both such fine and imprisonment * * *.

The Alaska Commercial Fisheries Regulations, 1956, provide in part:[1]

> PART 121—Southeastern Alaska Area, Sumner Strait District, Salmon Fisheries
>
> § 121.2. *Definition, Sumner Strait district.* All territorial waters bounded on the north by

[1] Additional amendments to the 1956 Regulations appear in 50 C. F. R., Ch. 1, Subch. F (1958 Cum. Pocket Supp.)

a line commencing on the mainland at Mount Cote and passing successively through Babbler Point, Chichagof Peak, Drag Island, Low Point, Point Alexander, Frederick Point, Horn Cliffs, Kupreanof Island east shore at 56 degrees 54 minutes north latitude, the northernmost end of Duncan Canal, Keku Strait at 56 degrees 40 minutes north latitude, the watershed of Kuiu Island and the latitude of Cape Decision projected westerly; and on the south by a line following the watershed of Cleveland Peninsula from the International Boundary to Union Point and passing successively through Ernest Point, the southernmost point on Etolin Island, the watershed of Etolin Island, Point Harrington, the northern end of East Island, the southern end of West Island, Prince of Wales Island east shore at 56 degrees 9 minutes 15 seconds north latitude, El Capitan Passage at 56 degrees 7 minutes 36 seconds north latitude, the watershed of Kosciusko Island, the southermost point on Kosciusko Island, Wood Island, and the latitude of Wood Island projected westerly.

§ 121.3. *Open Season, Ernest Sound and Anan.* Fishing, other than trolling, in Ernest Sound and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited, except from 6 o'clock antemeridian July 15, to 6 o'clock postmeridian August 18. During this season the weekly closed period, except for trolling, is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday.

§ 121.4. *Open Season, Exception.* With the exception of Ernest Sound and the vicinity

of Anan Creek, fishing, other than trolling, is prohibited, except from 6 o'clock antemeridian July 20 to 6 o'clock postmeridian August 24. During this season the weekly closed period, except for trolling, is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday.

STATEMENT

On July 12, 1956, at 12:30 p. m., petitioners were found fishing commercially in Alaskan waters between the islands of Wrangell and Etolin 1.4 miles northwest of Thorns Point, the southernmost point of Wrangell Island (R. 40, 41, 45, 78, 168). A supervisor of the Fish and Wildlife Service discovered petitioners' boat, completely alone and unconcealed (R. 41, 42, 61, 84). He told petitioner Rustad, the captain of the boat, that he was fishing in Zimovia Strait, a closed area, and that he was under arrest. Rustad replied that he believed he was fishing in the Anan district, an open area (R. 41, 42, 44, 47, 170, 232). A fishery management agent of the Fish and Wildlife Service was contacted and he took charge of the vessel (R. 73, 171, 172, 233). Again a disagreement arose as to whether petitioners were fishing in Zimovia Strait. Rustad, in spite of the fishery agent's explanation and consultation of maps and the "Coast Pilot", a handbook that petitioners had on board, maintained that the boat was not in Zimovia Strait, but south of it (R. 79-82, 233-235).

Petitioners were then charged, in the United States District Court for the District of Alaska, with the offense of fishing in Zimovia Strait, a closed area, in

violation of 48 U. S. C. 222 and Sections 121.3 and 121.4 of the Alaska Commercial Fisheries Regulations, 1956 (R. 3).

At petitioners' trial before a jury government witnesses testified that in their opinion Zimovia Strait was the body of water between Etolin Island and Wrangell Island where the two islands come together at the junction with Ernest Sound (R. 77, 78). The southern entrance to Zimovia Strait, they thought, was on a line between Thorns Point, Found Island and Etolin Island (R. 81, 93, 98, 102, 106, 122). It was also brought out that the "Coast Pilot", an official United States Government publication of the work of the Geological Survey and the Coast and Geodetic Survey (R. 104–105), designated Thorns Point and Found Island as lying at the southern entrance to Zimovia Strait (R. 81, 94, 204).

Petitioner Rustad and other witnesses on petitioners' behalf testified that at the time of petitioners' apprehension they were fishing in the Anan-Ernest Sound section, an area which had been opened for fishing from 6:00 a. m., July 12, 1956, by an amendment of Section 121.3 of the regulations promulgated on July 11, and not in Zimovia Strait (R. 167, 179, 224, 225, 232, 233). They testified that, in their judgment, Zimovia Strait was an area lying to the north of an imaginary line between Thorns Point, Trap Rock and Etolin Island and thus north of where petitioners were fishing (R. 197, 240, 241).

Petitioners were found guilty. Petitioner Rustad, captain of the vessel, was fined $1,500; the other peti-

tioners, members of the crew, were each fined $750; and the balance of the catch was forfeited (R. 297–298).

On appeal from their convictions, petitioners contended that the term "Zimovia Strait" as used in the regulations was too indefinite and thus rendered them unenforceable; that the trial court erred in its instructions to the jury and in refusing to permit certain exhibits to be taken to the jury room; and that certain telegrams sent by the Fish and Wildlife Service notifying fisheries of an amendment of Section 121.3 advancing the opening date in the Ernest Sound and Anan section from July 15, 1956, to July 12 also had the effect of amending the regulations so as to legalize fishing in Zimovia Strait on the latter date (see Pet. App. vi). The Court of Appeals rejected these contentions and affirmed the convictions. Circuit Judge Pope wrote a concurring opinion stating his agreement with substantially all of the opinion written for the court by Circuit Judge Barnes, but expressing some doubt that Section 121.4 includes Zimovia Strait. But since this point was not made at the trial or on the appeal and since the administrative construction includes Zimovia Strait within Section 121.4, Judge Pope felt that the court was not called upon to notice the point. On a petition for rehearing petitioners invoked this point and argued that the information therefore did not charge an offense. The petition for rehearing was denied, with Judge Pope dissenting from the denial.

ARGUMENT

1. Petitioners' first contention involves the question concerning which Judge Pope expressed some doubt. The argument is that Zimovia Strait is part of the Ernest Sound-Anan Creek area, as evidenced by the parenthetical clause in Section 121.3 excluding the strait from the prohibition against fishing in that area before 6:00 a. m., July 12,[18] and that since the Ernest Sound-Anan Creek area is excepted from the general prohibition of Section 121.4 against fishing before July 20, neither section covers Zimovia Strait, with the result that the information did not charge an offense (Pet. 6–10).

We agree that Section 121.3 does not cover Zimovia Strait and, consequently, that the July 11, 1956, amendment of that section opening the Ernest Sound-Anan Creek area to fishing beginning at 6:00 a. m. on July 12, 1956, did not authorize petitioners to fish in the strait at the time of their apprehension at 12:30 p. m. on July 12, 1956. We do not agree that Section 121.4 does not cover Zimovia Strait.

The Alaska Commercial Fisheries Regulations were promulgated in accordance with an act of Congress passed for "the purpose of protecting and conserving

[18] As noted above, Section 121.3 was amended on July 11, 1956, to advance the opening date for fishing from 6:00 a. m., July 15, to 6:00 a. m., July 12, 1956, "because adquate early escapement of pink salmon assured in Anan Creek" (Pet. App. v). Petitioners were found fishing in Zimovia Strait at 12:30 p. m., July 12, 1956. They do not renew here their contention below that the amendment of July 11, 1956, had the effect of opening Zimovia Strait at 6:00 a. m., July 12.

the fisheries of the United States in all waters of Alaska * * *" (48 U. S. C. 221). Part 121 of the regulations specifies the closed seasons and other restrictions on fishing in the waters of the Sumner Strait District, as defined in Section 121.2. Petitioners correctly concede (Pet. 7) that Zimovia Strait is within that district. Section 121.3 sets forth the dates of the closed season "in Ernest Sound and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait)" and Section 121.4 specifies the closed dates for the rest of the waters in the Sumner Strait District. The remaining sections of Part 121 (Sections 121.5–121.11) contain restrictions on methods of taking fish and designate certain named areas in the district as "closed waters". Obviously, Zimovia Strait was specifically excepted from the provisions of Section 121.3 so as to leave no doubt that it is subject to the restrictions set forth in Section 121.4.

Petitioners' interpretation of these regulations is illogical and contrary to their plain purpose and meaning. If their view is correct, Zimovia Strait would be the one and only body of water in the Sumner Strait District subject to no closed season whatever.

2. Petitioners further contend (Pet. 14–16) that the term "Zimovia Strait" as used in Section 121.3 is so vague and indefinite as a description of the area intended to be covered by the term as to render the regulations unenforceable in that area.[2]

[2] Judge Pope agreed with the majority below in rejecting this contention.

In *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, this Court, in referring to some of its prior decisions upholding statutes as sufficiently definite, stated that those decisions "rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them", citing *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 502; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348. The Court of Appeals correctly applied this principle here. As it pointed out (Pet. App. vii), Zimovia Strait is clearly marked on a navigational chart (No. 8161) prepared by the United States Coast and Geodetic Survey (Govt. Ex. 1 (R. 74–77)), a copy of which was on petitioners' boat at the time of their apprehension.[3] Petitioners were commercial fishermen, experienced in the waters in which they were found. And the record shows, as the court below also pointed out, that "Of the many fishing boats out on the opening day, none but this captain and crew had any difficulty in determining the limits of Zimovia Strait and where they should not fish" (Pet. App. vii).[4]

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[3] We have lodged with the Clerk of this Court a copy of this chart which has not been included in the formal record transmitted to the Court.

[4] As petitioners point out (Pet. 17), the regulation of Alaskan fisheries will devolve upon the new State of Alaska after it has made "adequate provision for the administration, management and conservation of said resources in the broad national interest." Thus, petitioners' contentions as to the proper construction and validity of the regulations involved here do not present questions of future importance in the administration of the federal criminal law.

3. The 10th instruction given by the court to the jury was as follows (R. 12):

> It is not necessary that the government prove that the defendants intended to fish illegally or that they knew they were fishing illegally at the time in question. It is only necessary to prove that the defendants actually fished commercially for salmon in the waters of Zimovia Strait on the 12th day of July, 1956.

Petitioners' contention (Pet. 11–14) that this instruction was prejudicially erroneous because it permitted the jury to convict upon a standard of proof less than proof beyond a reasonable doubt is refuted by the other instructions given by the trial court specifically covering this subject. Instruction 10 pertained only to the subject of petitioners' intent. The court's instructions 3 and 4 stated the presumption of innocence and the government's burden of proof clearly and correctly. Another instruction (number 5) was devoted solely to a definition of reasonable doubt (R. 10–11). Finally, instruction 18 admonished the jury not to consider just one instruction by itself, but to decide the case in the light of the instructions as a whole (R. 20). It is thus apparent that instruction 10 did not minimize or reduce the government's burden of proof and in no way misled the jury on this subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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